BROWNE-TANKERSLEY TRUST

IBLA 82-49 Decided September 19, 1983

Appeal from decision of Acting District Manager, Phoenix District, Arizona, Bureau of Land Management, holding appellant liable for trespass damages. AZ-020-4-201.

Affirmed in part; set aside and hearing ordered in part.

1. Mineral Lands: Mineral Reservation -- Patents of Public Lands: Reservations -- Stock-Raising Homesteads -- Trespass: Generally

   The removal of sand and gravel for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass since such sand and gravel has been reserved under the Act.

2. Appraisals -- Rules of Practice: Hearings

   Where an appellant establishes that an appraisal of the value of sand and gravel removed from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), did not consider the rights to compensation of the surface owner in its determination of trespass damages, the case may be referred to the Hearings Division for a fact-finding hearing.

APPEARANCES: John C. Lacy, Esq., Tucson, Arizona, for appellant; Fritz L. Goreham, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Browne-Tankersley Trust has appealed from a decision of the Acting District Manager, Phoenix District, Arizona, Bureau of Land Management (BLM), dated September 10, 1981, holding appellant liable for trespass damages in the amount of $222,000 for sand and gravel removed from November 1973 through December 1979, plus an additional $0.35 per ton for minerals removed since January 1, 1980.

By notice dated November 13, 1979, BLM informed appellant that it had committed a trespass, involving the removal of sand and gravel from the N 1/2

SW 1/4, SE 1/4 SW 1/4 sec. 5, T. 14 S., R. 15 E., Gila and Salt River meridian, Arizona. Appellant is the record owner of the surface estate of the land involved herein, which was originally conveyed to appellant's predecessor in interest under patent No. 1016587. That patent was issued pursuant to the Stock-Raising Homestead Act (SRHA), 43 U.S.C. § 291 (1970) (repealed by section 702 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701-84 (1976)), section 9, of which, required that the United States reserve "all the coal and other minerals in the lands so entered and patented." (Emphasis added.) Various negotiations as to liability and the computation of damages ensued, but no settlement was reached. Appellant admitted removal of the sand and gravel, but argued that these substances had not been reserved under its patent.

In its September 1981 decision, BLM determined that sand and gravel was a "mineral," within the meaning of the mineral reservation mandated by the Stock-Raising Homestead Act, supra, citing Western Nuclear, Inc., 35 IBLA 146, 85 I.D. 129 (1978). BLM concluded, therefore, that the unauthorized removal of sand and gravel from the land involved herein constituted a trespass in violation of the Act of July 31, 1947, as amended, 30 U.S.C. § 601 (1976), and 43 CFR 3602.1. BLM assessed damages on the basis of the appraised value of the amount of sand and gravel removed from November 1973 to the present.

In its statement of reasons for appeal, appellant reiterates its contention that it is not liable for trespass damages because the patent, of which it is the successor in interest, did not reserve sand and gravel to the United States. Appellant argues that sand and gravel should not be considered a "mineral," within the meaning of the mineral reservation mandated by the SRHA.

The Board's decision in Western Nuclear did hold, as the State Office noted, that "gravel in a valuable deposit is a mineral reserved to the United States in patents issued under the Stock-Raising Homestead Act." Id. at 165, 85 I.D. at 139. This ruling was affirmed by the United States District Court for Wyoming in Western Nuclear v. Andrus, 475 F. Supp. 654 (1979). However, while the instant appeal was pending before the Board, the Court of Appeals for the Tenth Circuit reversed the District Court and held that the gravel extracted did not constitute a mineral reserved to the United States. See Western Nuclear v. Andrus, 664 F.2d 234 (1981). The United States thereupon filed a petition for a writ of certiorari, which was granted by the United States Supreme Court on May 24, 1982. 456 U.S. 988 (1982). On June 6, 1983, the Supreme Court rendered its decision, styled Watt v. Western Nuclear, Inc., 103 S.Ct. 2218, in which it reversed the Court of Appeals and held that commercial deposits of gravel were reserved under the mineral reservation mandated by the SRHA. 1/ Thus, to the extent appellant has suggested

1/ While the decision of the Supreme Court was addressed solely to the question of whether commercial deposits of gravel were reserved under the SRHA's mineral reservation, its rationale would necessarily apply to commercial deposits of sand, as well. In its decision, the Court expressly rejected the argument which had been accepted by the Court of Appeals that Congress, in adopting the SRHA in 1916, must be deemed to have been aware of

that the sand and gravel removed from the patented lands were not reserved, the Supreme Court has conclusively answered that question. 2/

Appellant, however, raises two additional arguments. First, it argues that the appraisal is defective, primarily because it failed to take into consideration appellant's title to the surface estate and the fact that it must be compensated for any destruction of the surface estate attendant upon extraction of the sand and gravel. Appellant has also alleged other substantive deficiencies in the appraisal. Second, it argues that BLM is not entitled to any damages, since it is incapable "of disposing of the 'product' for which the trespass is alleged" (Statement of Reasons at 2). We will examine this latter contention first.

Appellant contends that BLM is not entitled to any damages because the minerals removed are within land withdrawn pursuant to the Act of October 5, 1962, 76 Stat. 743, which states, in relevant part, that "the mineral interests of the United States which have been reserved in patents * * * are hereby withdrawn from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from disposal under the Act of July 31, 1947." The thrust of appellant's argument is that, since the United States presently lacks the statutory authority to dispose of the minerals reserved to it, it "is not being deprived of any asset it has the ability to dispose of." Appellant's argument, however, ignores the fact that, regardless of whether the United States can presently dispose of this asset, it still, consistent with the Supreme Court's decision in Western Nuclear, owns it. Appellant's unauthorized disposal of this Governmental asset is properly the subject of a trespass action, regardless of whether or not the Government can, at the present time, dispose of it, itself. 3/

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the 1910 Departmental decision, in Zimmerman v. Brunson, 39 L.D. 310. This case had held that land containing deposits of gravel and sand useful for building purposes was not mineral land beyond the reach of the homestead laws, except in cases in which the deposits possess a peculiar property or characteristic giving them special value. To the extent that the Court rejected the Zimmerman analysis insofar as commercial deposits of gravel are concerned, it rejected as well the argument that commercial deposits of sand were not reserved.

2/ We are well aware that the Court indicated that the owner of a SRHA patent might be able to use reserved minerals where such use was essential for stock-raising or the cultivation of crops. See Watt v. Western Nuclear, Inc., supra at 2228-29 n.14. The instant appeal, however, clearly does not present that fact situation.

3/ In fairness to appellant, we recognize that it conceded that "under normal circumstances the equities would be in favoring the availability of damages for the unauthorized disposition." It argued, however, that "in this case, with the long-standing operations on the Property, together with the equally long-standing inattention to the matter by the Bureau of Land Management" it should not be liable in damages. In our view, while such considerations are properly used in determining the nature of the trespass (which, we feel, the record clearly establishes was unintentional in nature), they do not establish immunity from recovery by the United States. A trespass can be long standing and in total good faith, but it is a trespass, nonetheless.

[2] Turning to appellant's attack on the appraisal, however, we find ourselves in substantial agreement with the thrust of its primary argument. The SRHA, and its implementing regulations (43 CFR 3814.1) established specific procedures to protect the surface patentee from, or compensate him for, destruction of the surface estate. While it is true, as the Field Solicitor points out, that the surface patentee cannot prevent a Government licensee from either prospecting for or removing reserved minerals, appellant is equally correct in contending that the requirement of compensation to the surface patentee necessarily reduces the value of any mineral found from that which might obtain if the Government owned both the surface and mineral estate. In other words, where the Government disposes of minerals on lands that it owns in fee, the price which it receives represents both the value of the mineral and the value of access rights and any residual damage to the surface estate.

In the instant case, however, the Government is possessed only of the mineral estate. Should the Government lease its mineral estate under the express provisions of the SRHA, appellant would be entitled to compensation for damage to its surface estate. A prospective mineral lessee, aware of this fact, would seek to lessen its payments to the Government precisely because it would have to pay additional compensation to the surface owner. Nothing in the Government's appraisal indicates that this fact was given any consideration. 4/

Appellant has requested that, if the Board determined that sand and gravel were within the mineral reservation, we refer the matter to an Administrative Law Judge for a factual hearing under 43 CFR 4.415. In light of the failure of the appraisal to expressly consider the fact that appellant was vested with full title to the surface estate, we feel that a hearing is warranted. Accordingly, we will refer the matter to the Hearings Division for the assignment of an Administrative Law Judge for the purposes of ascertaining the fair market value of the sand and gravel removed. The Administrative Law Judge is directed to issue an initial decision which may be appealed by any party adversely affected. Inasmuch as we are referring this case for a hearing we will not comment on any of the other arguments which appellant made concerning the sufficiency of the appraisal. Such arguments are best considered in the context of the hearing. 5/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed

4/ The fact that appellant has, itself, mined this deposit does not alter the economic realities. The surface of the estate is still suffering a compensable injury, which is properly computed as part of appellant's operating costs.

5/ We would note, however, that the Field Solicitor correctly points out that the language of 43 CFR 9230.5-1(b)(2) relating to a deduction for expenses related to removal and transportation of the mineral was merely language proposed in a regulatory provision which was never adopted.

from is affirmed as to the question of whether sand and gravel were reserved minerals under the SRHA, and referred to the Hearings Division for the adjudication of the proper level of damages owed to the United States.

James L. Burski
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Douglas E. Henriques
Administrative Judge